No. 11900

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,*

vs.

MARCELLUS B. HAYES and MARY I. HAYES, also known as BELL HAYES, husband and wife; ADELBERT M. HAYES, and HARNEY COUNTY, a municipal corporation and political subdivision of the State of Oregon, *Appellees,*

and

MARCELLUS B. HAYES and MARY I. HAYES, also known as BELL HAYES, husband and wife; and ADELBERT M. HAYES, *Cross-Appellants,*

vs.

UNITED STATES OF AMERICA, *Cross-Appellee.*

Upon Appeal from the District Court of the United States for the District of Oregon

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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BRIEF FOR APPELLEES AND CROSS-APPELLANTS

In accordance with the stipulation of the parties filed herein, the following brief is submitted as a combined brief on behalf of Marcellus B. Hayes, Mary I. Hayes and Adelbert M. Hayes, as appellees, in answer to the opening brief of the appellants herein, and also as their opening brief as cross-appellants on cross-appeal.

JURISDICTION

As stated in the complaints filed herein (R. 2, 9 and 27), this is a land condemnation proceeding by the United States pursuant to the Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257), and the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222, 16 U.S.C. Sec. 715). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U.S.C. Sec. 225 (a).

STATEMENT OF THE CASE

1. *The Pleadings.*

As stated in appellant's brief (p. 2), the condemnation proceedings in question were instituted on April 22, 1946 (R. 2-7), and an amended complaint was filed on August 13, 1946 (R. 9-14). At the same time there was pending an action by these same landowners against the United States under the Tucker Act for damages resulting from the use and occupation by the United States of a portion of the same lands (R. 105). On October 2, 1946, an answer was filed in this case alleging that the land involved had a value of $55,084.00 (R. 18-22). On February 11, 1947, a declaration of taking was filed alleging that $16,000.00 was the reasonable value of the interests to be condemned (R. 23-26). On February 13, 1947, a second amended complaint was filed, asking for condemnation of the fee simple title, subject

to a five year reservation of a portion of the lands (R. 27-33). On February 26, 1947 a judgment was entered on the declaration of taking (R. 36-39). Apparently the previous answer was regarded as an answer to the second amended complaint, as a reply was then filed by the Government on September 11, 1947, and as an affirmative reply alleged that defendants had entered into an agreement to sell the lands, subject to the reservation, for $16,000.00, and were, therefore, estopped from demanding any further sum (R. 41-44). Defendants filed a motion to strike this affirmative reply (R. 53-54), but the motion was never ruled upon.

2. *Negotiation of Contract for Sale of Lands and Settlement of Case.*

On October 9, 1946, without instructions or authorization from United States Attorneys in charge of this litigation (R. 134, 148), and despite protests from attorneys for defendants complaining of such conduct in other cases (R. 133), and with full knowledge that defendants were then represented by counsel (R. 141, 142, 146), two representatives of the Fish and Wildlife Service of the United States Department of Interior contacted Mr. and Mrs. Hayes and their son, in the absence of their attorneys, and persuaded them to sign an agreement under which they agreed to accept $16,000.00 for their lands, subject to a five year reser-

vation in their favor for the use of a portion of the lands for livestock operations (R. 46-53). It also provided that the vendors gave up all claims of compensation for damages under the Tucker Act (R. 51).

At that time Mr. Hayes was eighty-two years of age and his wife was seventy-two years of age (R. 94). They had written to one of their attorneys concerning a verbal offer of compromise by the Government and had been advised by him against its acceptance (Def. Ex. 3, R. 100). The Government agent was told by them of this advice but he replied that "he took it for granted that it would be all right with Mr. McCulloch for us to sign it" (R. 102); that "anything to keep it out of court would be better than going to court" (R. 103, 116); that the Government was going to get the land even if they did contest the case (R. 116). The Government agents then called their head office in Chicago by telephone to expedite authorization of a contract on those terms (R. 142), had Mr. and Mrs. Hayes sign it the next day in their own home, not even in the presence of a notary public, and then took the contract and their son, Adelbert, to a notary public in town to have it notarized (R. 145).

Mr. and Mrs. Hayes testified that they did not want to sell the land (R. 97), but that they thought the Government would take it anyway (R. 110, 115) and that it

would therefore be best to compromise the case rather than to incur the expense and delay of litigation (R. 111). They also testified that they did not know and were not told by Government agents that if the case went to trial and the verdict of the jury was too high to please the Government, it might then decline to take the land and leave it with the previous owner, as later happened in condemnation proceedings for other Malheur Lake lands, and that if they had known this they would have refused to enter into the proposed agreement, since they did not want to sell their lands (R. 131).

In addition, Mr. and Mrs. Hayes testified that they then had a case pending against the Government for damages for the use and occupation by the Government of a portion of their lands (R. 105, 118); that they didn't realize and were not told that the proposed agreement included a settlement of this case (R. 104, 105, 118), and that the reference in the contract to the Tucker Act meant nothing to them, as they didn't know and were not told what the Tucker Act was (R. 105). They also testified that it was their understanding, from previous discussions with Government agents, that the contract would give them an option to lease a portion of the lands back from the Government for as long as they wanted it (R. 119, 120), a provision not included in the written form of agreement (R. 46-53).

Finally, Mr. and Mrs. Hayes testified that the agreed figure of $16,000.00 did not represent an agreement as to the actual value of their lands, but was no more than a figure far below the actual value of the land, agreed upon solely for the purpose of compromise and avoiding further litigation (R. 97, 103, 111, 114, 115, 129); and that this figure was acceptable even on this basis solely because they needed funds badly and were told that payment would be forthcoming within two months (R. 96, 114, 117), a promise which did not materialize (R. 97, 117).

The Government agents admitted telling the Hayes that it was the intention of the Government to take their lands (R. 137), claimed that they told the Hayes that the settlement would "include the claims under the Tucker Act" (R. 137, 140-1), but of the actual conversations could remember only some discussion about the five year reservation (R. 149). They also admitted that the figure of $16,000.00 was arrived at solely from the standpoint "Can we compromise our difficulties and settle the entire situation on the lake" (R. 137; see also R. 141), and that it was often their practice to attempt settlement of condemnation cases directly with landowners and without their attorneys, even though litigation had been instituted (R. 142). They also admitted that they knew that the contract itself was not submitted for

approval to attorneys for the Hayes and took no steps to do so themselves, although their office was within a mile from these attorneys' office (R. 149, 150).

At the trial of this case, attorneys for Hayes requested that the entire story of the circumstances under which the contract was negotiated be submitted to the jury (R. 90, 345). Instead, this phase of the case was tried before the Court, sitting without a jury (R. 89). The Court then held that although the Hayes had apparently changed their minds (R. 150) the contract should be set aside upon the ground that it was represented that the Government was going to take the land in spite of everything; that the Hayes relied and had a right to rely on this representation and that it was not carried out (R. 151). The Court also set aside the contract upon the ground that it was negotiated in an "entirely and absolutely unethical" manner by going "behind the backs of attorneys" representing the Hayes (R. 151). In a later oral opinion the Court also held that the Hayes didn't know that they were compromising their damage claim under the Tucker Act and were under the impression that at the end of the five year reservation they would have an option to lease the land for an additional term (R. 343).

The Court then set out to restore the status quo, on one hand, by setting aside the contract, and, on the other

hand, by offering to set aside the declaration of taking filed in reliance on the contract, on motion of the Government (R. 153). But the Government declined to make such a motion (R. 345), although the Hayes and their attorneys had, off the record and without advising the Court, agreed that this might be done, in order to restore the lands to the former owners (R. 108, 345-7).

3. *Description of Lands and Estimates of their Value.*

The testimony concerning the value of the Hayes farm was, of course, submitted to the jury (R. 161). The defendants' evidence on the question of value showed that this farm consisted of 1101.68 acres of land, of which 928 acres were in the lake-bed of Malheur Lake and 174 acres immediately adjacent (R. 315). That portion of the lake-bed has been dry since 1931 (R. 225), but, due to the moisture in the soil and its richness, is particularly valuable for grazing land for cattle and for growth of hay and grain (R. 173-4, 202). The Hayes grazed about 500 cattle on these lands (R. 171). They also planted oats and barley which produced from 60 to 100 bushels of oats per acre from portions of these lands (R. 177), although during some years the water did not recede in time to plant grain (R. 214). All of the 928 acres of lake-bed lands were extremely rich (R. 221) and were suitable for either growing grain (R. 179, 225-8) or hay (R. 180,223,229). The average yield of hay

was between one and one-half tons per acre (R. 204). It was also an excellent range for cattle, which could graze throughout the winter without hay (R. 182). The lake-bed lands were also valuable because of the presence of thousands of ducks and geese and also for the trapping of muskrats (R. 184-5). The lands adjoining the lake-bed were also rich (R. 229) and were productive for hay and grain, although there was a dry knoll of from 70 to 80 acres of greasewood (R. 190).

Defendants called two expert witnesses to testify as to the value of these lands. One, Mr. Howard, an engineer in charge of appraisal of all agricultural lands in nearby Klamath County for the Oregon State Tax Commission and a member of the Appraisal Board for the U. S. Reclamation Service (R. 238), appraised these lands at a valuation of $40,245.00 (R. 242). The other, Mr. Cozad, was called as a stockman and appraised the lands, solely "as a stock raising deal", at a valuation of $23,885.40 (R. 259).

The Government, on the other hand, called one of the agents employed directly by the U. S. Fish and Wildlife Service, who negotiated the settlement contract and who placed a value of $10,800.00 on these lands (R. 291, cf. R. 136-7). This included a valuation of $15.00 per acre on some hay lands (R. 299) and $10.00 per acre on some of the grain lands (R. 301). The other appraiser called

by the Government, a real estate man from Portland, who also loaned money and sold insurance and who had been engaged for the previous two or three months by the Fish and Wildlife Service to devote most of his time to appraisal work, placed a value of $9,922.00 on the lands (R. 306,311).

The appraisals by defendants' witnesses were made on the basis of the value of the fee simple title of the lands in question, with nothing deducted for the five year reservation for a portion of the lands (R. 242, 261). The Government witnesses, however, considered the value of the reservation in their estimates (R. 291, 311). One of the Government appraisers testified that the value of this reservation was the sum of $932.00 (R. 305).

4. *Instructions to the Jury, Verdict and Decision of the Trial Judge.*

The foregoing testimony on the question of value was submitted to the jury under usual instructions in land condemnation cases (R. 324-337). In this connection the jury was cautioned to remember the uncertain effect of the water level of the lake, which fluctuated from year to year, upon the value of the land (R. 330), and specifically instructed to bear in mind the reservation, "which in this instance is very important" (R. 327). It was emphasized that the effect of the reservation would be to

exclude the purchaser from livestock feeding operations on a portion of the land for five years, that this would be a considerable factor in setting the price which a willing purchaser would pay, and that the jury "must consider this reservation in fixing the fair market value" (R. 332).

The Court also instructed that the defendants' appraisers had "entirely disregarded" the reservation in their estimate of value, but that the Government appraisers had given "full weight" to the reservation (R. 334). The term "reservation" was referred to no less than seventeen times in the instructions, and the form of verdict, which was read to the jury, also specified and described the reservation and made it clear that the "just compensation" was to be "subject to the reservation" (R. 337).

The jury returned a verdict in the amount of $36,500.00 (R. 55) and judgment was entered thereon (R. 56). The Government then filed a motion to set aside the judgment and verdict and for a new trial, on the grounds (1) that the verdict was excessive, (2) that it was not supported by any competent evidence, and (3) that it was the result of passion, prejudice and caprice (R. 59).

Upon the hearing of this motion the trial judge set aside the verdict and judgment, but instead of granting a new trial ordered that the declaration of taking be stricken and the case dismissed (R. 60). In doing so, he held that the verdict was excessive, but only for the reason that the jury did not give proper value to the reservation; that it was error not to submit the contract to the jury as evidence of value; that, on the other hand, the contract was not valid and binding and should be set aside, for reasons already stated, and that the declaration of taking, being based on the contract, should also be set aside (R. 341-4).

Both parties have appealed from this decision.

SPECIFICATION OF ERRORS

A. *On Appeal by Government.*

As limited by the specification of errors in the Government brief (p. 7), the questions raised on appeal by the Government are whether the District Court erred:

1. In striking the declaration of taking, vacating the judgment thereon and order granting immediate possession, and dismissing the proceedings.

2. In refusing to enforce the contract between the landowners and the Government.

3. In holding that the contract between the part-

ies was negotiated by the agents of the Government in an unethical manner.

4. In holding that the landowners did not know what was in the contract.

It will be noted that the Government originally designated other points of alleged error not specified as errors in its brief and not argued as errors in its brief (See Points 2, 6, 8 and 9 (R. 69-70). Therefore, the Government must be deemed as having waived these points on appeal. *Cyclopedia of Federal Procedure* (2d Ed.) Sec. 6197, Vol. 12, p. 182, and cases cited therein. It is also to be noted that appellants' specifications of error do not state wherein the trial court erred, as required by Rule 20 of this Court, and this point is not to be deemed as waived by appellees by argument in opposition to appellants' specifications of error.

B. *On Cross-Appeal.*

It is the position of appellees, as appellants on cross-appeal, that the District Court erred in the following respects:

1. In holding that it was error on the part of the Court not to submit to the jury the contract between the parties as a measure of damages in this case (R. 342) for the following reason: The contract had been set aside

on the ground of mistake, misrepresentations and concealment and thus could not be used for any purpose; the contract was not proper evidence of fair market value, was inadmissible as an offer of compromise, and the Government was estopped from claiming any error in not submitting the contract to the jury. (For designation of point on cross-appeal see R. 72, 352).

2. In holding that the verdict of the jury as to the value of the property involved was excessive (R. 342), for the reason that there is no evidence to support such a finding and for the further reason that the verdict was neither excessive nor based upon an erroneous application of the law, but was supported by substantial evidence. (For designation of point on cross-appeal see R. 72, 352)

3. In holding that the jury, in determining the value of said property, did not give proper value to the reservation retained by defendants and disregarded the instructions of the Court to give value to said reservation (R. 342), for the same reason stated under specification 2 above and for the further reason that it appears from the record that the jury did give proper value to said reservation. (For designation of point on cross-appeal see R. 72, 352)

SUMMARY OF ARGUMENT

A. On Appeal by Government.

1. The Court erred in striking the Declaration of Taking for the reason that, title having vested in the Government, the Government had no power to do so, and for the further reason that the Government failed to move to strike said Declaration and therefore waived its right to do so.

2. The Court did not err in refusing to enforce the alleged agreement to sell the land, for the following reasons:

   (a) The contract was invalidated by the conduct and representations of Government agents, indicating that the Government both could and would condemn and take defendants' lands if they did not enter into said contract, regardless of anything that might happen.

   (b) The contract did not correctly set forth defendants' understanding that they would have an option to lease back the lands.

   (c) The Government agents concealed the fact that the contract would include settlement of all claims for use and occupancy of the lands.

(d) The Government had the burden of proof that there was no deception and that all was fair, open, voluntary and well understood, but failed to satisfy this burden of proof.

B. On Cross-Appeal by Appellees.

1. It was error at the conclusion of the trial to hold that the contract should have been submitted to the jury as a measure of damages.

(a) The contract had been set aside on the ground of mistake, misrepresentation, concealment and overreaching and, therefore, could not properly be used as a measure of damages.

(b) The contract did not reflect the fair market price of the land.

(c) The contract was no more than an offer of compromise.

2. It was error for the Trial Court to set aside the verdict as excessive and to hold that the jury did not give proper value to the reservation indicated by defendants.

(a) A jury verdict is not to be set aside as excessive unless it is so clearly excessive as to

shock the conscience of the Court or unless it is manifest that the jury adopted a false theory of law in arriving at its conclusion.

(b) The Trial Judge did not hold that the verdict exceeded the fair market vaue of the land, but only that the jury did not give proper value to the reservation indicated by defendants, and there is no evidence whatever to support any such finding.

(c) Even if the verdict be considered as excessive, it should be cured by remittitur, rather than sent back for new trial, under the circumstances of this case.

ARGUMENT ON APPEAL BY GOVERNMENT

1. WHETHER COURT ERRED IN STRIKING DECLARATION OF TAKING.

We do not question the authorities cited in the Government brief to support the proposition that by filing the declaration of taking and depositing the sum estimated to be just compensation the United States became vested with title to the lands here involved and was powerless to withdraw the declaration and that the District Court was equally powerless to dismiss it. (Gvt. Br. pp. 7, 8).

It is true that there is some logic in the position of the trial judge to the effect that since the Government filed its declaration of taking in reliance upon the agreement with the Hayes as to the amount to be paid for the land, if the agreement is to be set aside, so also the declaration of taking should be set aside (R. 344). It should be remembered, however, that when the agreement was first held to be invalid, and before any testimony on the question of land values was submitted to the jury, it was suggested to the Government that it might desire to file a motion to set aside the declaration of taking (R. 153). The Government attorney then called the Attorney General by telephone for instructions on that point (R. 153), and defendants' attorneys then informed the Government attorneys that since defendants preferred to keep the land it would be quite agreeable with them to have the declaration of taking set aside (R. 345). But instead of following this suggestion of the Court, consented to by defendants, and with full knowledge that the agreement would not be submitted to the jury as a measure of value (R. 153), the Government decided that it would rather risk the outcome of a jury trial and submit to the jury the question of the value of the lands involved. Even at the conclusion of the trial and after the verdict the Government did not move to set aside the declaration of taking, but only for a new trial (R. 59).

Therefore, despite the logic of the position of the trial judge *at the time when his proposal was first made,* there would be neither logic nor justice in setting aside the declaration of taking after the Government had deliberately chosen such a course of action and after defendants had been put to the expense and hazard of a jury trial. It follows that appellees are in agreement with the Government upon appellant's first specification of error, although for somewhat different reasons.

II. The Court Did Not Err in Refusing to Enforce the Agreement to Sell the Land for a Specified Sum.

Specifications 2, 3 and 4 of the Government brief (p. 7) may well be discussed together, as was done in its brief (pp. 8-11). The ultimate question, as stated by the Government brief (p. 8), is whether "the Government was entitled to have judgment entered for the amount stipulated in its contract with the defendants".

It is submitted, however, that this question cannot be resolved as simply as the Government would suggest, i.e., upon the grounds that a *valid* agreement between the Government and a landowner fixing the purchase price of the land in event of condemnation is enforceable; that this contract was "unexceptionable"; that defendants *at that time* were satisfied with the contract, and should not be allowed to "change their minds"; that

the defendants were not incompetent, and that the Government agents were under no obligation to see that the contract was submitted to defendants' attorneys before it was signed by defendants (Gvt. Br. pp. 8-11).

Independently from these considerations there are several reasons why this agreement is unenforceable and why it does not estop the defendants, as alleged by the Government (R. 41), from seeking true and "just compensation" for their lands, as determined by a jury, although in excess of the amount specified in the contract. These reasons include the following:

A. *The contract is invalidated by the conduct and representations of Government agents indicating that the Government both could and would condemn and take defendants' lands if they did not enter into the contract, regardless of anything that might happen.*

Defendant Mary I. Hayes testifed that "Mr. Schaar told us that the Government would get our land anyway. * * * If he had said, 'If this land goes too high the Government will give it back to you, we wouldn't take it,' * * * we wouldn't have signed anything" (R. 131). See also testimony of defendant Marcellus B. Hayes that "* * * they impressed on us that it was only a matter of time until they would take it away from us * * *" (R. 116) and that he would only willingly abide by the contract "if there is no such thing as getting possession

of the land again" (R. 127). Government agent Woodward admitted that "The fact that there was a condemnation action pending against the land was discussed, and I indicated that that suit showed the intention of the Government to acquire the title" (R. 137).

In other words, defendants were given to understand that the Government had unalterably decided to take their lands, come what may, and had the right to do so, and on this understanding entered into a compromise agreement rather than be involved in protracted and expensive litigation which could only end in the acquisition of the land by the Government. As a matter of fact, however, the Government had no such unalterable intention to take this land, at all costs, but intended that if the jury verdict was too high it would let the landowners keep their land. This intent is demonstrated by what actually happened in other condemnation cases in the Malheur Lake area, in which the Government declined to take the land in many cases where jury verdicts were too high to please the Government and let the lands remain with their previous owners, after putting them and their attorneys to the expense and trouble of prolonged litigation. The Government attorneys in this case will admit that this was true. And, of course, the Government had this legal right under the provisions of the Declaration of Taking Act, as long as no declaration had been filed. See 40 U.S.C.A. Sec. 258 (a).

Thus there was a real possibility that by not signing the contract defendants would be able to retain their land, which was their primary desire, and ample basis for the finding by the trial judge in his oral opinion in this case that

> "* * * whether these agents of the Government directly *promised these people or not or represented for the Government that the Government was going to take this land in spite of everything,* I think that the representation was made by the circumstances and by what had been said in court and out of court for a good many years. I am not casting any blame on the attorneys for the Government who are presently representing it, but the Department does have some responsibility and there are some people in the Department who have been cognizant of this situation all the time that I have. So I think that that representation was made and I don't think it was carried out, and I think it was one on which they have some right to rely." (R. 151).

That this representation, and the resulting misunderstanding by defendants of their legal rights and those of the Government, requires that the contract be set aside is made clear by the following rules of law as stated by *Pomeroy's Equity Jurisprudence,* Sec. 849, quoted with approval in the case of *Order of United Commercial Travelers v. McAdam,* (C.C.A. 8th), 125 Fed. 358, 369:

> "A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, du-

ties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. * *Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party, which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person, with respect to his own private legal rights and liabilities, may be properly regarded—as in a great measure they really are—and may be dealt with as mistakes of fact. * * *

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative; treating the mistake as analogous to, if not identical with, a mistake of fact."

In a case somewhat similar to the instant case, although involving an action under the Tucker Act, the validity of a compromise agreement for taxes induced

by misrepresentations of a Government agent as to its right to enforce payment of such taxes was in question. Thus, in *Staten Island Hygeia Ice & Cold Storage Co. v. United States* (C.C.A. 2nd), 85 F. (2d) 68, at 71-72, it was held as follows:

> "* * * to allow the government to insist upon a compromise induced by its agent's misrepresentation of its rights against a taxpayer, * * * would be highly inequitable and is not sanctioned by the authorities.
>
> * * *
>
> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant.
>
> * * *
>
> "It should make no difference that the United States is the party against whom the rescission is sought. * * * where the United States seeks to adopt the benefit of an agent's act in procuring the offer of compromise it must also take the burdens accompanying that act.
>
> "If the deputy collector acted beyond his authority * * * his agency was nevertheless ratified when the government took advantage of the offer he had procured."

Finally, as stated in *In re Construction Materials Corp.,* 18 F. Sup. 509, at 519, 526, quoting *Williston on Contracts,* Secs. 1544 and 1500:

> "Where the parties assumed a certain state of facts to exist, and contracted on the faith of that

assumption, they should be relieved from their bargain if the assumption is erroneous.

* * *

"It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false. Innocent misrepresentation is sufficient. For though the representation may have been made innocently, it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such representations."

It is therefore submitted that since in this case defendants were under a complete misapprehension of their legal rights and liabilities, as well as those of the Government, and of the true nature of the relation between the Government and the owner of land against which the Government has filed condemnation proceedings, and since it is clear that defendants would not have signed the contract in question if they had correctly understood these rights, liabilities and relations, and, particularly since in this case defendants' misunderstanding arose because of the active conduct and representations of agents of the Government, the established rules of law set forth in the above-quoted cases prohibited the Government from enforcing the contract in this case and justified the trial court in setting it aside.

B. *The contract is further invalidated by the reason that it did not correctly set forth defendants' understanding that they would have an option to lease back the lands.*

Defendant Marcellus B. Hayes testified that it was his understanding that the contract of sale was "along the lines that we had agreed upon"; that it was not only to provide for a reservation for five years of the use of part of the lands, but that it was also to provide that after the five year reservation defendants should have an option of leasing this land for as long as they wanted it. (R. 119-120). This was not denied by Government witnesses.

Based upon this testimony the trial judge made the following finding in his oral opinion on the case:

> "On the other hand, the contract itself was negotiated in a way which makes me believe that the Hayeses didn't know what was in the contract. The testimony of Hayes, given on the witness stand, indicated to me that he had very carefully worked out a reservation that he desired and he expected to get. That reservation was that he should have this land free for five years, at the end of that time that he should have an option to lease it at a price to be agreed upon under the rules and regulations laid down by the Secretary of the Interior, and that when that time had elapsed he had another option. Now, those options, in my opinion, are of great value, even with the reservation that the Secretary of the Interior could lay down rules upon which the value of the lease would be computed, or the value of the rental.
>
> " * * * it certainly was unethical to write into the contract things that they did not agree to and stipulations entirely contrary to what their agreement was. I have no doubt that Mr. Hayes' testimony was

correct and that that is what he stipulated for and that is what he thought he was getting." (R. 343-4)

The applicable rule of law in such a case is well stated in *Clarksburg Trust Co. v. Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 630, quoting from *Pomeroy, Equity Jurisprudence* (4th Ed.), Sec. 845:

> "If, * * * after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact."

To the same effect, it was held in *John T. Stanley Co. v. Lagomarsino*, 53 F. (2d) 112, at 114, as follows:

> "* * * an assertion that the writing does not represent the real agreement of the parties and was executed through fraud or mistake, and if established it is of course a good defense to a suit to enforce the written agreement."

So also, in *19 Am. Jur.* p. 75, the rule is stated as follows:

> "Relief may be had where it is shown that, by means of mistake, a written contract does not express the agreement of the parties thereto, notwithstanding the language of the writing is that which was agreed on by the parties. Relief may be sought on account of the omission from a written contract of a provision upon which the parties had agreed."

It is therefore submitted that since the contract did not express the agreement of the parties in one important respect, i.e., the right of defendants to an option to lease, and was executed by defendants through mistake in this respect, it cannot be enforced by the Government and should have been set aside, as was held by the trial court.

C. *The concealment by Government agents of the fact that the contract would include settlement of all claims for use and occupation of the land also invalidated the contract.*

Defendants Marcellus B. Hayes and Mary I. Hayes testified that they did not know that the contract would include a settlement of their claims against the Government for use and occupation of their lands (R. 105, 106, 118); that the reference in the contract to the "Tucker Act" meant nothing to them because they didn't know what the Tucker Act was (R. 105). and that the Government representatives made no mention or explanation of the fact that the contract would include a settlement of these claims (R. 105, 118). One of the Government agents testified that after agreeing upon the sum of $16,000.00 as a compromise figure for the condemnation of the land and "shortly before I left the house I indicated to them that we would like in that settlement to include the claims under the Tucker Act." (R. 137). The contract provided that the vendors

agreed to divest themselves of "all right, title or interest to said land, including any claims, or compensation for damage or right they might have under and by virtue of what is known as the 'Tucker Act' " (R. 51). Finally, as the Government attorneys will concede, these so-called "Tucker Act" cases had been filed and were then pending in court and were being handled by attorneys for the Hayes on a contingent basis.

Based on this evidence it was found by the trial judge in his oral opinion as follows:

> "* * * I don't think that they knew that they were compromising the damage claim they had against the Government" (R. 343).

In considering whether this is a sufficient ground for setting aside the contract it must be remembered that Mr. Hayes was over eighty-two years of age and his wife over seventy-two years of age; that they were represented by attorneys; that despite knowledge of these facts the Government agents came to their home, told them that if they didn't sell the Government would take their land by condemnation, and induced them to sign the contract in question, not even before a notary public (supra, p. 4). Under these circumstances it is clear that defendants relied and had a right to rely on the Government agents to disclose all facts material to the execution of the contract. As Mrs. Hayes said, "I simply

trusted to what Mr. Schaar said * * * " (R. 104). That the Government agents, under these circumstances, and after purposely evading defendants' attorneys, must have known that defendants would rely upon them and upon their making a full and fair disclosure is obvious.

The rule of law applicable to such facts is stated in the case of *Davis v. Commissioners of Sewerage,* 13 F. Sup. 672, at 678, as follows:

> " * * * where one party to a contract knows that the other relies on him disclosing fully all facts material to the execution thereof, a duty rests on such person to not conceal anything material to the bargain, and if there is concealment resulting in damage to one, the other causing it must assume the entire responsibility."

As further stated in *Winget v. Rockwood*, 69 F. (2d) 326, at 332:

> "Equity will even relieve against a mistake of law when the surrounding facts raise an independent equity, and where there has been a mistake of law by one party induced by misrepresentations, deceit, or undue influence on the part of the other, or where advantage has been taken *in any way* of one's ignorance of the law to mislead him or her into a relation of trust and confidence which has been abused, and this is especially true if the mistake inures to the advantage of the person whose advice is taken."

These rules are particularly applicable where, as here, the Government is claiming an estoppel against defendants from asking to have just compensation for their land determined by the jury. Thus, as held in *Leathem Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 F. (2d) 923, at 928:

> "No estoppel arises from a mistake of fact, preventing the meeting of the minds of the parties; on the contrary an estoppel must have its origin in clearly understood facts and a waiver does not arise unless all material facts are disclosed. * * *
>
> * * *
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> "If concealment of material facts exists, even though not intentional, it creates a mistake of fact that prevents consummation of an agreement, by the meeting of the minds upon agreed facts."

It follows that where, as here, the defendants relied and were entitled to rely upon the Government agent to make a full and fair disclosure of all material facts, their failure to inform defendants that the contract would destroy their previous claims for damages for the use and occupation of their lands, at least in a way that defendants understood that they were compromising these claims, prohibited the Government from enforcing the contract and fully justified the trial court in setting it aside. Moreover, this court should not approve the practice of settling cases behind the backs of attorneys who have a contingent interest in any amounts recovered and this is a further reason why it was neces-

sary and proper to set aside the settlement agreements in this case.

D. *The Government had the burden of proving that there was no deception and that all was fair, open, voluntary and well understood, but failed to satisfy this burden of proof.*

As the record shows and as stated above, the Government agents well knew that defendants were represented by attorneys (R. 141, 142, 146). But instead of negotiating with these attorneys, whose office was within a mile from their office in Portland (R. 150), these agents went to Malheur Lake and sought to deal directly with an aged couple in their home and behind the backs of their attorneys. And upon inducing them to agreement these agents were so hasty to put it into written form and to circumvent defendants' attorneys that they telephoned Chicago by long distance for authorization, rushed out the next day and had Mr. and Mrs. Hayes sign it in their own home—not even in the presence of a notary public (supra, p. 4).

As held by the trial judge, this action was "entirely and absolutely unethical" (R. 151), and that "* * * it was entirely unethical to deal with those people in that way * * * " (R. 343). This is one of the grounds upon which the trial judge set aside the contract (R. 151, 343). To sustain the contract executed under these cir-

cumstances and by these tactics would be to encourage this agency of the Government in tactics which it admits are a common practice (R. 142) and which should receive decisive condemnation by the courts by refusal to enforce any contract so induced.

But aside whether the moral impropriety and ethics of these circumstances furnish a sufficient and independent ground to set aside the contract, it is submitted that these circumstances at least impose upon the Government the burden of proving affirmatively that there was no deception, that all was open, fair, voluntary and well understood.

As held in the case of *Popovitch v. Kasperlik,* 70 F. Sup. 376, at 382, 384:

> "Where the relationship between the contracting parties appears to be of such a character as to render it certain that they do not deal on equal terms, but that on one side from overmastering influence or, on the other side, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, it is incumbent on the party in whom such confidence is reposed to show affirmatively that no deception was used, and that all was fair, open, voluntary and well understood.
>
> * * *
>
> "The rule is founded upon principles of public policy and is irrespective of any admixture of deceit, imposition, overreaching, or other causes of fraud. There must be full and clear proof that the

> transaction was a free and an intelligent act of the party, fully explained to him, and performed with a thorough understanding of the transaction and of its consequences."

In view of the facts of this case, as set forth above, it is clear that the above quoted rule of law is applicable to this case. It is apparent, however, that the Government did not satisfy this burden of proof, since it was found by the trial judge that there was misrepresentation and concealment by the Government agents and a lack of understanding by the defendants (R. 151, 343). It is therefore submitted that the trial judge was fully justified in refusing to enforce the contract and in setting it aside.

ARGUMENT ON CROSS-APPEAL BY APPELLEES

I. It Was Error at Conclusion of the Trial to Hold That the Contract Should Have Been Submitted to the Jury As a Measure of Damages.

Although not assigned as an error by the Government in its motion to set aside the verdict and for a new trial (R. 59), the trial judge, in his decision setting aside the verdict, striking the declaration of taking and dismissing the case (R. 342-5), held not only that the verdict was excessive (R. 342) but also as follows:

> "There is another reason why the verdict can't stand. The Court was in error in not allowing the Government to show what the contract was. If the jury had found that these people had agreed to the

value that they did on that contract, I am quite sure they would not have returned the verdict that they did." (R. 342-3)

The Government not only did not include the failure of submitting the contract to the jury as a ground in its motion to set aside the verdict, but also failed to specify it as an error on appeal and to argue this point in its brief. Therefore, it would appear that the Government cannot now complain of the failure of the trial court to submit the contract to the jury, either as a measure of damages or otherwise.

If, however, this Court should desire to consider this matter, appellees and cross-appellants submit the following argument why the trial court was correct in not submitting the contract to the jury as a measure of damages and why it erred in later holding that the contract should have been so submitted.

A. *Since the Contract was Properly set aside on the Ground of Mistake, Misrepresentations, Concealment and Overreaching, it could not be used as Measure of Damages.*

In this case, after setting aside the contract fixing the value of defendants' property in the event of condemnation proceedings for the reasons set forth above (supra, p. 7 to p. 8; see also R. 151, 343), and therefore refusing to hold that defendants were bound by the

contract or to submit it to the jury as a measure of damages, the trial judge later, after conclusion of the trial, held that it was error not to submit the contract to the jury for that purpose (R. 342).

While it is true that a contract induced or executed by mistake, misrepresentations, concealment or overreaching is not wholly void, but is voidable at the election of the party so induced, it nevertheless remains true that when, as in this case, such an election is exercised and such a contract is set aside, it then becomes void ab initio, as though never executed, and neither party can thereafter claim anything based upon such a contract. It follows that it was entirely proper for the trial court in this case, after setting aside the contract for these reasons, to exclude the contract from evidence as a measure of damages. It also follows that it was error for the trial judge to hold later that he had erred in not submitting the contract to the jury for that purpose (R. 342-3).

Moreover, the same reasons which were relied upon by the trial judge in setting aside the contract apply with particular weight as objections to the use of the contract as a measure of damages and render it invalid for that purpose. In this case, as pointed out above (supra, pp. 4-6), defendants executed the contract under a mistaken understanding of their rights and liabilities

and those of the Government, and believed that the Government was determined to take their lands, come what may, and regardless of the amount of any jury verdict. This misunderstanding went directly to the price at which they agreed to sell their lands. For they testified that had they known that if they held out and a jury had returned a verdict higher than the Government wanted to pay, they could then keep their land, they then would have refused to sell at any price because of their desire to keep their farm (R. 113-4, 115, 131).

Similarly, the understanding that they were to have an option to lease the lands for as long as they liked (R. 119-120), a further ground for setting aside the contract, went directly to the propriety of its use as a measure of damages, for the reason that if defendants had understood that they were not to have such an option they undoubtedly would have insisted upon more money. For the same reason, defendants' failure to understand that their claims under the Tucker Act were to be included in the settlement went directly to the amount for which they were willing to sell, and if they had correctly understood the facts they would not have agreed upon any such figure.

Therefore, since the very grounds for setting aside the contract reflect directly upon the propriety of its use as a measure of damages, and since the contract,

once set aside, became void ab initio, it would have been entirely erroneous for the Court to have submitted it to the jury for that purpose.

B. *The Contract did not Reflect what an Owner Willing, but not Required to Sell and a Buyer able and Willing to Buy would have Agreed upon as a Purchase Price.*

In this case both defendants testified that they did not want to sell their farm and that the only reason for signing the agreement was that they were told and understood that if they did not do so the Government would take their lands anyway (R. 97, 103, 108, 111, 112-15, 116, 130-1). They testified that "if we were selling this land otherwise we would ask a lot more money for it, but since the Government was going to take it and it had to go through court we compromised on that basis, in order to keep it out of the court and the expense of the court trial" (R. 103; see also R. 114, 119, 123).

Under these circumstances it is clear that the price set forth in the contract was not a figure agreed upon by a seller who was willing, but not required, to sell, as is the recognized requirement in arriving at the fair market value of land. Moreover, in condemnation proceedings the landowner has a constitutional right to receive "just compensation", which is the fair market value of his lands, no more and no less. To pay him less

would be to violate his constitutional right. *Garrow v. United States,* 131 F. (2d) 724, 726. It therefore would have been wholly improper for the contract to have been submitted to the jury as a measure of damages or as evidence of the fair market value of the lands involved in this case.

C. *The Contract was no more than a Compromise Offer.*

It appears from the record that even after the contract was set aside it was offered by the Government in evidence as an offer in writing by defendants to sell their lands on the terms set forth in the agreement (R. 165).

It is a universally recognized rule of law, however, that offers made for the purpose of compromising litigation are not admissible as evidence of admissions on the issue of damages. Since the agreement in this case is not binding as a contract, for reasons stated by the trial judge and as pointed out above, its only possible remaining use could be as an admission of an offer by defendants to sell their lands at the figure stated therein.

While cross-appellants contend that the contract, once set aside, cannot be used for any purpose, and particularly on the question of market value and as a measure

of damages, for reasons stated above, if it be held to the contrary appellants then contend that the contract is further inadmissible as a source of admissions by the landowners as to the value of their lands, for the reason that any such admissions, including the entire agreement, were recognized by both parties as nothing more than a compromise of pending litigation.

The term "compromise" was used again and again by both defendants (R. 96, 97, 99, 100, 103, 111, 114, 115, 116, 129). The fact that the final terms were agreed upon solely as a means of compromising pending litigation and avoiding the expense and delay of trial was also recognized again and again (R. 111, 119, 129). The Government agents themselves testified that "* * * we discussed it solely from the standpoint of 'Can we compromise our difficulties and settle the entire situation on the lake?' And we eventually arrived at a compromise figure of $16,000 in cash and five years use of * * * Parcel 48 and the upland" (R. 137).

This, of course, is one of the basic reasons for the rule excluding from evidence all offers of compromise, i.e., to encourage friendly settlement of dsputes. Therefore, it follows that the agreement was inadmissible as a measure of damages or as evidence of the fair market value of the land for this reason alone, if for no other.

D. *The Government is Estopped from Complaining of any Error in the Failure to submit the Agreement to the Jury as a Measure of Damages.*

In this case defendants' counsel stated on the record his desire that the contract and the circumstances surrounding its execution should be submitted to the jury (R. 90). The Government, however, had prevailed upon the Court to determine the validity of the contract sitting alone, without a jury. It was only because of this circumstance, and after the contract had been held to be invalid, that defendants later objected to the admission of the contract before the jury (R. 165).

It follows that since defendants originally desired to have the contract and all of the attending circumstances submitted to the jury but were prevented from doing so by the Court at the request of the Government, neither the trial judge nor the Government are in a position to complain that this was not done, and any error from the failure to so submit the contract to the jury was invited by the Government. Therefore, under the doctrine of "invited error", the Government cannot complain.

In addition, as already pointed out, the Government did not include this alleged error as a ground in its motion to set aside the verdict and for a new trial (R. 59). Nor did the Government specify it as an error on appeal or argue the point in its brief. Thus the Govern-

ment must be considered as having waived any such error and cannot now complain of the failure to submit the contract to the jury as a measure of damages.

II. It Was Error for the Trial Court to Set Aside the Verdict of the Jury as Excessive and to Hold that the Jury Did Not Give Proper Value to the Reservation Retained by Defendants.

In setting aside the verdict, it was held by the trial court as follows:

> "The verdict was, in the opinion of the Court, excessive. I think that the jury did not give proper value to the reservation. The reservation of five years without rental upon that land, in my opinion, is worth a great deal more than the Court believes the jury gave to it. As I view the jury's verdict, they took Howard's figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand, and I think that is an improper result, and I, in the instructions, very carefully cautioned them to give value to that reservation but they didn't do it, so I take it that they did not follow the instructions. It is true they did not have to, but they are supposed to pay more attention to what I say than what they did, and as a result of it the verdict can't stand." (R. 342)

It is the position of cross-appellants that this finding of the trial court was error for the reasons stated below, which will be submitted as a consolidated argument under cross-appellants' specifications 2 and 3.

A. *A Jury Verdict is not to be set aside as Excessive unless it is so clearly Excessive as to shock the Conscience of the Court or unless it is Manifest that the Jury adopted a false Theory of Law in arriving at their Conclusion.*

The proper tests to be applied by the trial courts in determining whether to set aside a verdict alleged to be excessive are set forth in the following cases:

The Supreme Court of the United States, in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74, 9 S. Ct. 458, held that a federal trial court, in determining whether to set aside a verdict as excessive, should apply as a test whether "damages are *palpably and outrageously excessive*".

In *Smith v. Pittsburg & W. Ry. Co.*, 90 Fed. 783, 788, the Court held that:

> "A verdict should not be set aside simply because it is excessive in the mind of the court, but only when the excess is *shocking to a sound judgment and a sense of fairness to the defendant.* Where there is any margin for *a reasonable difference of opinion* in the matter, the view of the court should yield to the view of the jury, rather than the contrary."

Similarly, in *Burris v. American Chicle Co.*, 33 F. Sup. 104, 108, it was held that in a motion to set aside a verdict as excessive the Court must assume

> " * * * all the facts that the plaintiff's testimony reasonably tends to prove, together with all inferences in plaintiff's favor which may fairly be drawn from the facts * * *. It is not a sufficient ground for a new trial that a verdict is merely against the preponderance of the evidence, but *it must be so clearly against the evidence as to compel the conclusion that the verdict is contrary to right and justice.*"

It was held in *Malone v. Montgomery Ward & Co.,* 38 F. Sup. 369, at 370, as follows:

> "On a motion to set aside the verdict on the ground that it is excessive, or upon any other ground, the judge should not substitute his judgment for that of the jury, and where a motion is made upon the ground that the verdict is excessive, the verdict should not be set aside unless it shocks the conscience of the Court or unless it appears that the verdict was based upon prejudice or bias and was excessive. * * * The test is whether the size of the verdict * * * shocks the conscience of the Court, that is, whether the verdict itself indicates that it was the result of prejudice, bias or sympathy."

The same test, requiring the verdict to be so excessive as to "shock the sense of justice of the Court", was applied in *Zarek v. Fredericks,* 49 F. Sup. 64, and *Boyle v. Ward,* 39 F. Sup. 545. See also *Kaufman v. Atlantic Greyhound Corp.,* 41 F. Sup. 252, and *Carberry v. Acme Transit Co.,* 203 Fed. 780.

The same tests have been applied by the federal courts in land condemnation cases. Thus, in *United*

States v. Certain Lands in Jackson County, 48 F. Sup. 591, at 592, it was held that:

> "It (the verdict) must be approved unless erroneous legal principles effected it, there was no proper evidence upon which it could have been based, or unless it was the result of prejudice, fraud, or *so patently inequitable as to shock the conscience.*"

Again, in *United States v. 133.1 Acres of Land,* 42 F. Sup. 582, at 583, it was held that:

> " 'Where the evidence submitted to the jury is such as to render the issue doubtful, a new trial will not be granted, even though the verdict is against the apparent weight of the evidence.'
>
> * * *
>
> "It must be so manifestly and palpably against the evidence as to compel the conclusion that the verdict is contrary to right and justice."

And in *United States v. 1,192.9 Acres of Land,* 55 F. Sup. 995, at 996, it was held that:

> "After a review of the evidence in this case, we cannot say that the verdict is manifestly and palpably against the weight of evidence herein. We therefore decline to disturb it."

See also *United States v. City of New York,* 165 F. (2d) 526, 531.

Similarly, in *United States v. 2.4 Acres of Land,* 138 F. (2d) 295, it was held that a jury verdict based upon conflicting evidence

> " * * * will not be disturbed unless it is *manifest,* from all the circumstances in the case, that the jury adopted a false theory in arriving at their conclusion."

It is also established in condemnation cases, as in other cases, that it is improper for a trial judge to rely upon personal investigation or upon evidence not in the record. *United States v. Dillman,* 146 F. (2d) 572.

Finally, in *Columbia Heights Realty Co. v. Rudolph,* 217 U.S. 547, 560, 30 S. Ct. 581, the Supreme Court of the United States in a land condemnation case laid down the following principles:

> "The power of the Court to review the award by such a jury must, in the very nature of the matter, be limited to plain errors of law, misconduct, or grave error of fact indicating plain partiality or corruption. * * *The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them."

We will now demonstrate that in this case the verdict of the jury did not proceed under any erroneous theory of law, was supported by substantial evidence, and was not excessive under the established tests set forth above.

B. *The Trial Judge nowhere held that the Verdict exceeded the fair market Value of the Land, but only that the Jury did not give proper Value to the Reservation retained by Defendants, and there is no Evidence whatever to support any such Finding.*

In this case defendants' witness who appraised the lands in question for all purposes and uses testified that the fair market value of such lands was the sum of $40,245.00 (R. 238, 242). The other witness for defendants, who was careful to base his appraisal of the lands "as a stockraising deal", as distinct from "an overall purpose" (R. 259), testified that the lands were worth $23,885.40 for stockraising purposes alone (Id.) The latter witness testified that his appraisal did not consider the value of the five year reservation of a portion of the lands (R. 261). No questions or objections were addressed to the testimony of the first witness on this point, however, although it must be conceded that his testimony was upon the basis of the fair market value of the lands without reference to the reservation (R. 242).

One Government witness testified that the land was worth $10,800.00 (R. 291), the other that it was worth $9,922.00 (R. 311). Both of these witnesses considered the value of the reservation in their appraisal (R. 291, 310-11), and the former witness also testified that the five year reservation on the so-called "deeded lands" (uplands) and on Tract No. 48 of the lake-bed lands was worth $932.00 (R. 305).

The verdict of the jury found that the "fair market value" of the lands "reserving the right to use in live-

stock ranching operations, such as harvesting hay and the feeding and grazing of stock, the surveyed lands and Special Master Tract No. 48 * * * for a period of five years * ** and the just compensation to be paid for the taking of said lands, subject to said reservation, is the sum of $36,500.00'' (R. 55).

It will be noted that the trial judge not only did not hold but nowhere even intimated that the verdict of the jury exceeded the fair market value of the lands (R. 342). His only ground for setting it aside as excessive was that the jury ''did not give proper value to the reservation'' (Id.) Thus the sole question to be considered on appeal on the issue of excessiveness of the verdict is whether there is any substantial evidence to support the finding that the jury did not give sufficient value to the reservation.

In this connection, it is submitted that the following evidence shows conclusively not only that there was no evidence whatever to support such a finding, but on the contrary, there was substantial evidence that the jury did properly consider the value of the reservation:

1. The jury was cautioned to remember that the testimony of defendants' witnesses ''is not to be taken without some very considerable consideration upon your part as to the reservation * * * a very important reservation (R. 263).

2. The jury was carefully instructed to give value to the reservation. Reference to the reservation was repeated again and again in the instructions. And the form of verdict specifically stated that the amount of the verdict was the fair market value of the lands, subject to the reservation (R. 327-337; 55. See also p. 11, supra).

3. The jury went to view the premises, but the trial judge did not do so (R. 85) and thus has no basis for substituting his own judgment for that of the jury.

4. The verdict of the jury as to the value of the lands, less the reservation, was nearly $4,000.00 less than competent testimony as to the value of the lands, while the only direct testimony as to the value of the reservation was that it was worth $932.00.

5. The reservation did not run to all of the lands condemned, which totaled 1,101.68 acres (R. 30), but only to the deeded lands or uplands, totaling approximately 174 acres (R. 314-5), and to Tract 48 of the lake-bed lands, totaling 320 acres (R. 289-290).

6. The reservation was not for all purposes, but was limited to use in "livestock ranching opera-

tions'' and, more particularly, to harvesting hay and ''feeding and grazing of stock'' (R. 29).

7. Assuming for the purpose of argument alone, but not admitting, that a reservation for five years is worth twenty-five per cent of the value of the fee simple title, as indicated by the trial judge (R. 339), when it is remembered that the reservation was for only 494 acres of a total of 1,101.68 acres, or approximately forty-five per cent of the entire acreage; that the reservation was for a limited use and that from the date of the verdict (September 25, 1947, R. 56), there was little more than four years for the reservation to run (from October 9, 1946, R. 55), it appears that the Government appraiser was entirely correct in estimating the value of this particular reservation as approximately ten per cent of the value of the fee simple title of the entire tract.

8. It also follows that it was entirely proper for the jury to have accepted the ''Howard figure, which was on the basis of forty thousand dollars for the fee simple title, and appraised the reservation at four thousand'', as found by the trial judge (R. 342), or at ten per cent of the value of the fee simple title of the entire tract.

It follows that the verdict of the jury was not excessive and did not proceed on an erroneous theory of law, but was supported by substantial evidence and, at least, cannot be set aside as having been based upon a failure to give proper value to the reservation—the only ground suggested by the trial judge (R. 342).

C. *Even if the Verdict be considered as Excessive it should be cured by Remittitur rather than sent back for new Trial, under the Circumstances of this Case.*

For the reason set forth above, cross-appellants strongly insist that the verdict in this case was not excessive, but was entirely proper. If, however, this Court should determine that the verdict was excessive, and without in any way retreating from this position, it would then be the request of cross-appellants that this Court exercise its power of determining the amount of any such excess and suggesting a remittitur of such amount as a condition of denying a new trial of the case.

That this Court has ample power to suggest such a remittitur in such a case is established in the case of *United States v. Certain Parcels of Land,* 149 F. (2d) 81, 83, in which it was held as follows:

> "We recognize that the practice of requiring remittitur in the appellate courts, while almost universal in the states, is not established in federal appellate courts. We see no reason, however, par-

> ticularly in a condemnation case, why in the interest of saving the time and expense attendant upon a new trial, the practice should not be resorted to."

The reasons for remittitur stated in the above quoted case apply with particular force in this case. Here the principal cross-appellants are an aged couple. They are in need of funds (R. 94, 96). The litigation involving their property in Malheur Lake has now lasted over twelve years, since the Government first took over the lake-bed in 1936 for a bird refuge, as this Court well knows. These defendants may well not live for the months or years required for a further trial and possible appeal in this case. It is therefore submitted that this case is particularly suitable for the exercise by this Court of its power to suggest a remittitur as a condition of denying a new trial. Therefore, while cross-appellants still contend that the verdict was not excessive and should be reinstated, rather than set aside for a new trial, if this Court should determine that the verdict was excessive, cross-appellants will and do hereby agree to a remittitur in the amount found by this Court to be excessive as a condition of reinstating the verdict and denying a new trial of the case. As noted above, the only ground assigned by the trial judge in holding the verdict to be excessive was that the jury failed to give proper value to the reservation, while at the same time it was conceded by the trial judge that the jury considered the reservation was worth $4,000.00—over four times the

amount at which the reservation was appraised by the Government. But if this Court should feel that some additional value should have been given by the jury to the reservation, cross-appellees would welcome the suggestion of a remittitur in any such amount rather than to incur the expense and delay of a new trial.

CONCLUSION

Much of the explanation for the decision by the trial judge in this case is apparent from his following statement in announcing his final decision:

> "Well, I have tried to arrange this with you gentlemen, but you bring it up on a strict legal basis, and if you leave it that way I am going to rule on a strict legal basis. You have got your heads set, apparently, on the thing. I know the answer all the way through this case and I am going to give it to you. Now, if there is going to be no yielding on either side of this case, then you will have to take it as it is. (R. 341).
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> "Now, I have talked to you both about this case and I told you what you had better do and you haven't done it, so if you want to put it on a strict legal basis now you are going to take a strict legal result, if that is the way you want to submit it." (R. 342).

Only in the light of this statement is it possible to understand how a federal judge could reach the incongruous result of setting aside a verdict, on one hand, and a declaration of taking, on the other hand, and of

holding that a contract is to be set aside, but that it still should have gone to the jury for one purpose.

It is submitted, however, that this case should now be decided on the basis of a proper application of established principles of law to the facts of this case, as established by the evidence, and that to do so can only result in a decision by this Court as follows:

1. That the contract which the Government agents induced defendants to sign behind the backs of their attorneys, upon the basis of misrepresentations, concealment and mistake of law and fact, must be set aside for all purposes, including consideration as evidence of fair market value.
2. That the verdict of the jury was neither excessive nor based upon an erroneous application of the law, but was supported by substantial evidence and should be reinstated and judgement entered theron.
3. That, in any event, the declaration of taking should be restored and not set aside.

Respectfully submitted,

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